height requirement. For the benefit of both municipal governments and radio amateurs, the League urges that the Commission offer guidance in a few specific areas of land use regulation of amateur antennas. Some clarification of the "reasonable accommodation" and "minimum practicable restriction" language of 47 C.F.R. Section 97.15(e) would prevent municipalities from having to attempt to legislate these issues by litigation. It would also offer amateurs some assistance, because the preemption order as currently stated leaves enough room for interpretation that a municipality can effectively frustrate the Commission's intent in issuing the order. This, in turn, has necessitated expensive litigation on the part of individual amateurs, using post-tax dollars to protect what is, after all, a public service avocation.

21. Given the case law which has been created since the issuance of Amateur Radio Preemption, the required clarification is not extensive. Nor is it desirable or necessary to undo any of the protections for radio amateurs that have been built up by amateurs in the courts over the past ten years. It is equally clear that the radio amateur cannot necessarily install whatever antenna he or she may ideally like to have. The realities of land use regulation and living in metropolitan areas necessitate a balanced approach. The Commission's policy, however, should be the cornerstone of the "balancing" of the occasionally competing elements of land use regulations and amateur communications, and the Commission

(which, unlike municipal land use regulators, has the requisite expertise, unlike local land use authorities) should be the entity that does the balancing. The following are routinely encountered situations in which municipalities and other land use authorities continue to unreasonably regulate or preclude amateur radio antennas. Though this is done indirectly in some cases, such restrictions are the effective equivalent of preclusions of amateur radio communications.

22. The PRB-1 preemption order, twice, specifically disclaims application of the Commission's preemption policy to deed restrictions and covenants, often known as "CC&Rs" (covenants, conditions and restrictions). The theory of the disclaimer is that the amateur has alternatives to purchasing a residence subject to deed restrictions, and can, if he or she chooses, live in an area which is not subject to deed restrictions; thus, the acquisition of property in subdivisions regulated by covenants is a voluntary act, and a matter of private contractual agreement. That is an invalid theory in most metropolitan areas of the United States at the present time. Accordingly, the first clarification of the present policies should be as follows:

> **Point 1. The Commission should specify that it has no less interest in the effective performance of an amateur radio station simply because it is located in an area regulated by deed restrictions, covenants, CC&Rs, or condominium regulations, rather than by zoning ordinances.**

There is a reasonable legal argument to the effect that any judicial enforcement of covenants constitutes "state action",

and thus subjects otherwise purely private conduct to the Constitutional limitations applicable to government action. That argument is, in fact, supported by case law in the State of California, and in certain other states. However, no relief is available to amateurs in those states, or elsewhere, from arbitrary, and arbitrarily-established and enforced deed restrictions which prohibit amateur radio antennas or amateur station operation, because the Commission has disclaimed any interest in amateur stations regulated by covenants. It cannot possibly be that the Commission has any less interest in unreasonable covenant regulation of amateur antennas than it has with respect to unreasonable zoning regulation of those same antennas. The difference is merely that the Commission, in 1985, apparently believed that it did not have any jurisdiction to preempt private contractual agreements, and so stated in PRB-1. If the Commission would clarify that it intends for its preemption policies to apply equally to amateur antennas regulated by covenant, **to the extent that Federal jurisdiction exists with respect to covenant regulation of those antennas,** then amateurs could make their own attempt to invalidate those regulations, unfettered by the gratuitous and, arguably, legally incorrect disclaimer in the current PRB-1 statement that the Commission has no interest therein.

23. The Commission need not involve itself in covenant regulation of antennas, but neither should it create the erroneous impression that it has no interest in the ability of

its licensees to fulfill the Section 97.1 expectations for amateur stations merely because those stations are located in subdivisions which are regulated by covenant rather than municipal ordinance. The Commission in PRB-1 twice indicated that, because it does not believe that it has jurisdiction over covenant restrictions, covenant restrictions "did not concern" it. The Commission's reluctance to become involved in covenant regulations (which are, ab initio, private agreements between buyers and sellers of land) is certainly understandable, but it has led to a misconstruction by the courts of the Commission's interest in the effective performance of amateur radio stations which, by accident, happen to be regulated by covenants[8]. Specifically, it has been held that judicial enforcement of covenants constitutes "state action", and thus any judicial enforcement of covenants subjects those covenants to the same constitutional limitations and conditions that are applied to municipal ordinances. Shelley v. Kraemer, 334 U.S. 1 (1948); Park Redlands Covenant Control Committee v. Simon, 181 Cal.App. 3d 87 (1986); Cf., Ross v. Hatfield, 640 F. Supp. 708 (D.C. Kansas, 1986).

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[8] Lest the Commission misunderstand the nature of these restrictions, the buyer of land seldom actually agrees, or even understands when he or she buys property subject to deed restrictions that amateur antennas are not permitted. Most often, the covenant regulations specify that all accessory structures on a parcel must be approved in advance by the architectural control committee or homeowner's association. The decisions made by those groups are arbitrary by definition, as there are no conditions specified for approval or disapproval. There is no meeting of the minds, and no contractual element to modern day deed restrictions.

24. The best example of the problem that the Commission created in PRB-1 relative to covenants is illustrated by the case of Hotz v. Rich, ___ Cal. App. 3d ___, 6 Cal. Rptr. 2d 219, 92 Daily Journal D.A.R. 3821 (March 4, 1992), in which the California Court of Appeals for the First Appellate District reversed a trial court's holding that attempted enforcement of a covenant was void as preempted by PRB-1. The appellate Court held that, while there appeared to be state action in the judicial enforcement of a covenant which restricted amateur antennas, that was not sufficient to subject the antenna prohibition to PRB-1 requirements, because the PRB-1 Order revealed no preemptive intent on the part of the Commission. The Court held that the absence of preemptive intent was illustrated by the plain language of PRB-1. The amateur argued to the Court that the Commission had no less interest in the effective performance of an amateur radio station in a residential area which happens to be regulated by covenants than it had in a station regulated by zoning ordinances, and that the disclaimers in the PRB-1 order related to the Commission's assumption that it had no jurisdiction over purely private agreements. The Court, however, found dispositive the Commission's statement that the Commission did not have any concern over covenant regulation of amateur antennas, even though those covenants constituted prohibitions of amateur antennas or amateur station operation:

> The agency has the authority, subject to constitutional limitations unrelated to the supremacy clause, and within the scope of its Congressional authorization, to regulate private conduct, although such regulation would not be called "preemption." If the agency thought it desirable to make rules regarding restrictive covenants which impinge on radio communications, it would not be prevented from doing so by the supremacy clause (sic).
>
> Finally, and most importantly, defendant's interpretation fails because it is inconsistent with PRB-1 itself. In that ruling the agency excluded covenants from its preemptive scope, not because it believed it lacked the authority over them, but because, as voluntary contractual agreements, they were not "of concern" to the agency.

25. What is critical, given the proliferation of covenant regulations throughout the United States,[9] is for the Commission to clarify that the strong Federal interest in amateur radio communications applies equally to amateur stations regulated by covenant as well as to those regulated by ordinance; that the PRB-1 order was not meant to imply that the Commission has no intention to preempt those covenant restrictions that are subject to Supremacy Clause regulation; and that if the courts or legislative authorities find that there is state action in the judicial enforcement of covenants or otherwise, the Commission's preemption policies should be

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[9] Studies in recent years by League volunteers revealed that in many metropolitan areas, such as Dallas, Houston, Los Angeles, and San Francisco, as well as in Washington, Orlando and other cities, virtually all new housing developments were subject to covenant regulation which would either prohibit or significantly restrict amateur radio antennas. These restrictions include prohibitions on outdoor antennas; prohibitions of radio transmitters, and prohibitions on installation of any structure without the prior approval of the architectural control committee or homeowner's association.

considered applicable to those restrictions as well as to municipal ordinances and other land use regulation. If the Commission does nothing else to protect the Amateur Service, it must provide this requested relief, which is of absolutely no burden at all on the agency; which is no more than an accurate statement of Federal policy; and which is critical to the survival of the Amateur Radio Service in the United States in the long term.

Point 2. The Commission should clarify that the role of local governments and municipalities in applying the FCC's preemption policies regarding amateur radio antennas is to make reasonable accommodation for radio amateurs, rather than to "balance" their own local interests against the Federal interest in effective public service amateur communications.

26. The Commission itself did the balancing of potentially competing interests when it adopted its preemption policy in 1985. What remains for municipal land use authorities are the affirmative obligations: (A) to refrain from precluding amateur communications; (B) to make reasonable accommodation for amateur communications, including provisions for reasonable antenna height and configuration; and (C) to carefully consider whether a land use restriction, both on its face and as applied, is the minimum practicable restriction on amateur communications, in the context of municipal regulation in the exercise of state police power jurisdiction. It is apparent on the face of the preemption order that it is the municipality that must justify the restriction of amateur antennas in the

first instance; and only after that burden is met must the amateur justify a proposed installation. That too should be clarified, as it has not always worked out that way in practice.

27. As discussed above, some recent cases have held that, where a zoning conditional use permit process[10] exists, local authorities may **balance the communications needs** of a radio amateur against whatever local concerns exist in considering a particular conditional use permit application. See, e.g. Howard v. City of Burlingame, 937 F.2d 1376 (9th Cir. 1991); Williams v. City of Columbia, supra.

28. The Williams case is a particularly good illustration of the problem. Columbia, South Carolina has a 17-foot height limit in residential zones. It permits greater heights for accessory structures through conditional use permits, but there are no standards that an landowner could use to determine in advance whether a particular permit will be granted or denied. Williams, an amateur radio operator, applied for a use permit and was denied such after a hearing. The zoning authorities found that Williams did not use his amateur station for

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[10] A Conditional Use Permit, often known in the East as a Special Use Permit or Special Exception, is a provision within a zoning ordinance in which a landowner who has a use which is not permitted as a matter of right may nonetheless be permitted the use if justified, usually by oral hearing. It differs from a variance in that the latter involves a waiver of an absolutely prohibited use, and requires a hardship showing. A use variance hardship showing is an impossible burden for the radio amateur to meet, because denial of the variance would still permit other residential use of the property.

emergency communications but only as an avocation, and as such was not entitled to the protective considerations contained in the Commission's preemption order. The U.S. Court of Appeals for the Fourth Circuit stated as follows:

> In contrast to previous cases where zoning ordinances were found to be violative of PRB-1, it appears that by seeking a compromise with Williams, the City applied its zoning ordinance in compliance with FCC regulations. Specifically, the record reveals that the ZBA investigated the possibility of accommodating Williams' request (for a 65-foot antenna) while simultaneously preserving the aesthetic beauty and safety of the neighborhood by suggesting a restriction of hours of operation, but these attempts at compromise were rejected by Williams. Moreover, the ZBA's rejection of Williams' previous application for a special exception does not preclude him from now filing an application for a smaller structure or for an antenna which would only be fully extended during nighttime hours.
>
> We disagree with the position taken by the American Radio Relay League as amicus curiae that Williams must be allowed to build whatever he wants (sic). They contend that "a municipality cannot, consistent with the FCC's preemption regulation, limit amateur antennas under any circumstances to...any...nonfunctional height (in this case, anything significantly less than the 65 feet requested by the appellant)."...However, absent a full federal preemption in this area, the law cannot be that municipalities have no power to restrict antennas to heights below that desired by radio licensees. The law requires only that the city balance the federally recognized interest in amateur radio communications with local zoning concerns. The fact that Williams would only be satisfied if that balance results in the city allowing him to build an antenna of whatever height he chooses does not entitle him to relief.

Williams, supra, 67 RR 2d at 1631 (emphasis added).

29. It is the League's suggestion that the Williams Court was simply wrong[11] in its application of the PRB-1 policy of the Commission. It is not a "balancing" between the Federal interest in amateur antennas and municipal land use regulations that the courts should apply. The Commission itself, in adopting the PRB-1 policy, already established the balance between legitimate local concerns and its express interest in protecting amateur communications. What the courts (and local zoning authorities) are expected by the Commission to do in each case after PRB-1 is to determine whether the local zoning regulation, on its face and as applied in individual cases, meets the threshold test for preemption, i.e. whether the ordinance prohibits antennas, fails to "reasonably accommodate" them, or constitutes greater than the minimum practicable restriction on antenna installation to accomplish the municipal purpose.

30. The better analysis is as stated in Evans and Pentel. There is **no balancing to be done by municipalities.** They must, rather, make the accommodation for amateur radio communications, and their regulations must be the minimum necessary under the circumstances. The burden is properly on

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[11] In a number of respects, the decision is unfair. The League never argued, nor could its brief have been reasonably construed to suggest, that an amateur must be permitted whatever he or she desires. What was argued was that the amateur must be able to install a fundamentally functional antenna, which the evidence in that case showed was on the order of 65 feet. There clearly was required an antenna higher than the basically permitted 17 feet, and the height limit, applied strictly, had essentially the same effect as would a prohibition on all amateur communications.

the municipality to apply the Commission's policies. It should not be placed on the amateur.

31. To place the burden of applying the Commission's policies on the municipality, however, necessitates some guidelines for the municipality to apply. The best way to do that is for the Commission to specify a minimum height, below which municipalities and other land use authorities may not preclude amateur antenna installations.

> **Point 3. The Commission should delineate an antenna height, on the order of 60 to 70 feet, as the minimum that could be construed as a "reasonable accommodation" for amateur communications; It should declare as presumptively invalid any ordinance or local land use regulation (1) that could be construed to prohibit antennas of that height without a variance or (2) which fails to provide specific, nonburdensome standards for the grant of use permits.**

This point is not only consistent with the Commission's determination of reasonableness for antenna height in the Citizen's Radio Service in 1977; it is also a reasonable basic height delineation which will minimize radio frequency interference (RFI) and permit amateurs to conduct basic communications at MF, HF, VHF/UHF and microwave frequencies. This minimum height should be specified as a fixed minimum, below which municipalities cannot, or at least presumptively cannot, regulate: essentially a definition of "reasonable accommodation" which will provide guidance for the municipal land use regulators untutored in radio communication theory. Such a minimum permitted height should not preclude normal land

use provisions for insuring safety and minimum aesthetic impact of an antenna installation. Such factors include rear yard location requirements, house bracketing and guying, or use of retractable antennas. Of course, amateurs who live outside densely developed metropolitan areas and who have significant land on which to locate antennas should be permitted to install antennas of greater height and number. Nor should any specified minimum height be interpreted to suggest or permit a fixed maximum height for antennas. The cases indicate firmly that absolute, unvarying maximum heights are not permitted under PRB-1, and should not be. Accordingly, the Commission should not create, in defining a minimum permitted height, a de facto maximum height at the same time.

32. The League suggests that there is ample engineering justification for specifying a height of 60 to 70 feet as a definition of "reasonable accommodation."[12] In Bodony, the U.S. District Court for the Eastern District of New York held that:

> Testimony of experts indicates that a height of 60 to 70 feet is necessary for good reception under ideal atmospheric conditions. One Carl Silar, an amateur radio operator, stated that he received communications worldwide using an antenna which was less than 25 feet. He conceded 50 feet, 60 feet or 70 feet would achieve a better result. The FCC permits operators of Citizen Band (CB) radio transmitters to use an antenna 60 feet in height holding "the primary purpose of permitting such an increase in height is to enable licensees to erect antennas above nearby obstacles which may absorb

[12] Attached to this petition as Exhibit A is a copy of an engineering analysis of the effectiveness of amateur antennas at 35 feet versus 70 feet, prepared by an antenna expert formerly of the League's staff.

> radiated energy and thus decrease ability to communicate." 42 FCC 2d 511, 513 (1973). In Oelkers v. City of Placentia, No. CV 78-1301-RMT (C.D. Cal. 1979) (unreported decision) holding a 15 foot limitation on the height of an antenna unconstitutional as it affected the plaintiff amateur radio operator and found that the plaintiff was deprived of "some radio frequencies" at an increased height of 50 feet (as ordered by the Court).

Bodony, supra, at Footnote 2.

While of course there is infinite variability in terrain and the need for certain heights is impossible to standardize, a reasonable guideline as a minimum height for metropolitan areas is 70 feet. Such will minimize interaction between amateur stations and home electronic equipment and provide reasonable antenna efficiency at different amateur frequencies, MF through UHF and beyond. At the same time, such a minimum height specification can be accommodated without adverse impact on aesthetics or safety. Amateur antennas are permitted to be installed at up to 75 feet, for example, in Newport Beach, California, where property values are extremely high and development is dense. The only restriction is that such antenna support structures are to be retractable and kept retracted when not in use. Other measures to insure safety include house bracketing of the support structure or use of guyed support structures, rather than freestanding ones, and limitation of support structures to one, as in Virginia Beach, Virginia, another area of dense development. The same considerations exist in scenic corridors and historic districts that exist in areas of high property values. Minimized visual impact from

antenna installations does not equate at all to preclusion of antennas or unvarying limits on antenna height. Lessons learned in Newport Beach and Virginia Beach, Virginia are that siting of antennas for minimum visual impact and use of retractable antennas are a reasonable means of addressing unusual aesthetics requirements, such as in historic or scenic zones or corridors, and need not disaccommodate amateur radio communications at all.

33. In areas where development is less dense, such as exurban or rural areas, or in suburban areas where larger lots exist, there is less justification for any restriction on height, and a specified minimum height for regulation of amateur antennas in urban and metropolitan environments should not be construed as a concession that such height is a reasonable accommodation in all circumstances. Indeed, it is because of the variability in amateur communications needs that the courts have specifically disallowed any fixed, invariable antenna heights. Bodony, supra; Evans v. Commissioners, County of Boulder, 752 F.Supp. 973, 975-78 (D. Colo. 1990) (absolute height limits on antennas are facially inconsistent with PRB-1).

Point 4. The Commission should clarify that the imposition on radio amateurs of excessive costs for conditional use permits; excessive fees for use permit hearings; imposition of costs for engineering certifications; or the imposition of overly burdensome conditions in conditional use permits, such as complete screening of amateur antennas, where the cost of compliance approaches the cost of the antenna installation, may be deemed the

functional equivalent of a prohibition of amateur antennas, and are thus preempted.

34. There are a number of instances of the assessment of prohibitive and excessive fees in applying for either basic building permits or conditional use permits, or the assessment of hearing fees by municipalities. The result of these is that amateur antennas are, by virtue of municipal regulatory requirements, not economically feasible. While of course a municipality may, in an even-handed way, require the payment of reasonable fees for obtaining local authorizations in the same way it would require payments for similar land use authorizations for other purposes, the imposition of unusual costs for an antenna permit cannot be utilized, consistent with the Commission's express intent in PRB-1, as a means of indirectly prohibiting the antenna. While these fees could be construed as violative of the Commission's "reasonable accommodation" or "minimum practicable restriction" criteria, they are not identified as such by land use authorities, and some clarification is necessary. Where, for example, there is a requirement that the municipality retain the services of a consulting telecommunications engineer to independently determine the need for an antenna of a particular height, and those fees are passed on directly to the applicant[13], the

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[13] This is a type of zoning requirement that has been enacted in northern California in particular; the zoning authorities, recognizing a limitation in their technical ability to determine how high an amateur antenna ought to be in order to be "reasonably accommodated", have seized on obitur dicta in Howard v. Burlingame, supra, stating that:

process of obtaining a conditional use permit becomes completely cost-prohibitive. Furthermore, it is an unnecessary requirement, because of the existence of a significant body of technical literature already published on the subject. The same is true of conditional use permits that, for example, require that amateur antennas be completely screened from view by the installation of mature vegetation. The nature of amateur antennas is such that a full vegetative screening condition cannot be fulfilled cost-effectively, and might well aggravate rather than alleviate the visual impact of the proposed installation. The cost becomes a de facto prohibition.[14]

35. In certain cases, most notably in California, fees for conditional use permits are excessively high, causing amateurs

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> Finally, nothing in PRB-1 or the district court opinion forecloses the City from shifting the financial burden of evaluating ham radio antenna applications to the applicants, or from adopting the same inexpensive review process it currently utilizes for other building permits.

This statement is used as justification for a requirement that the city's cost in hiring expensive telecommunications engineering experts (of the municipality's choosing) can be passed on, without limitation, to the applicant for an amateur antenna. The City of Los Altos Hills has done this, as have other jurisdictions.

[14] The Commission's presently pending Notice of Proposed Rule Making, FCC 95-180, 10 FCC Rcd. 6982 (1995), at 6999-7000, addresses, in the context of satellite earth stations, this same issue. The present satellite dish preemption policy preempts any ordinance which "imposes costs on users...that are excessive in light of the purchase and installation cost of the equipment." The Commission proposes to revise that policy, in view of the falling prices for small satellite earth station antennas, so that the cost preemption criterion applies only to those restrictions which impose a "not-insignificant burden on the ability of owners to receive programming". The same policy should apply to amateur antennas.

to have to forego a functional antenna. CUP application fees are as high as several thousand dollars, with no assurance that a particular antenna permit will be granted. While certain municipalities, such as the City of Los Angeles, have established reduced fees (on the order of a few hundred dollars) for amateur antenna permits, this is not the case in other municipalities, such as Santa Barbara, California. Other costs are often assessed against the applicant radio amateur, based on the dicta in Howard v. Burlingame. These fees are routinely in excess of $1,500 per application, and are not limited at all. Such is a prohibitive cost for the radio amateur, who pays in post-tax dollars, and it is in essence a means of preventing any amateur antenna from being installed.

36. As to the vegetative screening requirement, one northern California municipality imposed such a condition, notwithstanding evidence that the planting of trees to comply with the obligation would cost in excess of $15,000. The condition was the exact equivalent of a complete prohibition on amateur communications. While the vegetative screening provision can be complied with when applied to satellite dish antennas in most instances, the necessary height of amateur antennas is such that the requirement is impossible to implement on any reasonable cost basis. A similar requirement, found occasionally, is the necessity of a certification of a registered professional engineer that a proposed antenna installation is safe. While this would at first glance appear

to be a purely safety-based restriction, the obvious less burdensome alternative is to comply with manufacturer's specifications for installation of support structures, which are themselves certified by the manufacturer's registered professional engineer when the installation instructions are prepared and the antenna supports designed. There is no basis for a wet-seal (original engineer's stamped certification) requirement on antenna permit applications (which adds between $500 to $1,500 to the cost of a permit application) if the manufacturer's specifications on the support structure have already been certified by a registered professional engineer, which is almost always the case.

37. While a municipality should be allowed to pass on reasonable expenses in issuing antenna permits to radio amateurs, not different from those applied to permits for other structures, such costs should not be used as a means of discouraging or prohibiting indirectly the installation of amateur antennas. This applies to use permit hearing fees, engineering certifications, and cost of compliance with conditions attached to the local authorization.

38. It is clear from the case law discussed above that zoning ordinances cannot impose arbitrarily-established fixed maximum height limitations on amateur antennas. Often, amateur antennas are permitted above minimal height, or with other dimensional limitations, only with a conditional use permit, special exception or special use permit. The cases, as

discussed above, note that a municipality need not grant any particular application for a conditional use permit. The cases hold only that a municipality must "consider" such applications, however, and under PRB-1, determine whether the denial of the special permit would constitute a reasonable accommodation. One case interpreted PRB-1 as requiring no more than consideration of the application, and if no compromise (dictated by the municipality) is agreed to, the permit can be denied without any further obligation at all on the part of the municipality. However, mere consideration, and then denial, of a particular permit application cannot be deemed to be the end of the municipality's obligation under PRB-1, because it does not require any substantive accommodation for the communications needs of the licensee. The municipality must still make reasonable accommodation for the radio amateur, even if a particular permit application is denied.

Point 5. The Commission should clarify that the denial of a particular use permit or special exception does not relieve the municipality of the basic obligation to make reasonable accommodation for amateur communications.

39. In the South Carolina case of Williams v. City of Columbia, for example, a conditional use permit for a 65-foot antenna was denied by the municipality. What the amateur was left with following the denial was the 17-foot maximum height limit permitted as a matter of right by the zoning ordinance. This was clearly insufficient to constitute a "reasonable accommodation", and the ordinance was not constructed to

constitute the least practicable regulation to accomplish the municipality's legitimate purpose. A reasonable minimum height limit for antennas permitted as a matter of right would be the simplest solution to this problem.

40. The principal difficulty with the case law on conditional use permits is that there is no indication what obligation a municipality has under PRB-1 if and when a particular conditional use permit application is denied. In Williams, for example, the amateur refused to voluntarily limit his amateur radio operation to nighttime hours, which was the proposed "compromise" offer of the municipality. The local jurisdiction simply has no authority to modify an amateur license on a de facto basis, and the "compromise" offered was properly viewed by the amateur as no accommodation at all. The Fourth Circuit United States Court of Appeals held, as discussed above, that the application of Williams for a 65-foot antenna could be denied, and that the amateur need not receive approval for any antenna he or she may desire. While this is of course true, the ordinance in Columbia, South Carolina permits antennas as a matter of right only up to 17 feet. Other ordinances are similar, routinely permitting antennas of minimal dimensions as a matter of right. Because the courts (quite properly) are willing to permit conditional use permits to be denied in particular cases, the problem that remains is that thereafter, the amateur is left with the option of filing yet another application (without any necessary guidance from

the municipality as to what will be permitted, except that the previous proposed configuration was found unacceptable), or simply to accept instead what he or she is permitted as a matter of right under the ordinance. The typical ordinance in these circumstances limits antenna height to no more than 20 to 30 feet (basic building height).

41. In Evans, the conditions offered as a "compromise" by the municipality (as conditions to be incorporated into the use permit) were completely untenable, limiting operation to specified hours and with other onerous restrictions that effectively precluded all or most of the utility of the antenna. The offer followed at least three different applications by the amateur for conditional use permits, because the municipality did not indicate what was acceptable when the previous applications were denied.

42. If the Commission established a minimum height that constitutes "reasonable accommodation," either by preemption of lower maximum heights in ordinances per se, or even as a presumption of invalidity, the issue of denial of conditional use permits would be of less effect, because the residual ability of an amateur to install at least a basically functional antenna would be assured. Some additional conditions might be reasonably imposed on antennas higher than those permitted as a matter of right. The problem now, however, is that if a particular conditional use permit is denied, municipalities and courts seem to believe that the obligation

to make reasonable accommodation for amateurs is somehow thereby discharged. The Commission should disabuse municipalities of such an assumption. An ordinance which provides for conditional use permits can only be deemed the minimum practicable restriction on amateur communications if it defaults to a reasonable accommodation: if a CUP is denied, the amateur must at least be able to install an antenna at a reasonable height: not 17, nor 25, nor 35 feet, but a reasonable height on the order of 60 to 70 feet.

43. Related to the above, conditional use permit processes are established means of land use regulation, and appropriately permit adjudication of land use proposals on a case-by-case basis. They should be recognized as such. As discussed above, however, before an amateur is subjected to denial of a conditional use permit, the ordinance must at least permit, subject to reasonable conditions, installation of an antenna of minimally sufficient height to permit regular amateur communications. This minimum height should be at least 60 to 70 feet above ground level.

Point 6. The Commission should determine that conditional use permit procedures are valid means of regulation of amateur antenna support structures, but only as an adjunct to a basic, minimum permitted height which is reasonable; and the specification of antenna dimensions independent of the support structures is preempted.

The Commission should clarify that the jurisdiction of the local land use authorities is not to limit the configuration of antennas themselves, but rather only the support structures.

Often, as mentioned above, municipalities attempt to regulate the dimensions of antennas other than height above ground, ostensibly to minimize aesthetic impact. Such restrictions, however, are almost invariably worded so as to prohibit virtually all amateur antennas below UHF, and to permit only television antennas. The interest of the municipality is in the aspects of antenna regulation that relate directly to health, safety and general welfare, not to the actual apparatus utilized for transmitting and receiving at an amateur station. Technical aspects of station configuration are for the Commission to regulate.

44. Certain conditions placed on municipal authorizations for antennas, or those limitations contained in ordinances, which have the effect of creating absolute, burdensome height limitations on antennas, but which have less burdensome alternatives, should be declared to be void as preempted. For example, antennas are often required to be located on a lot such that the base of the antenna support structure is set back from the nearest lot line a distance equal to the height of the antenna. Other versions of this same type of restriction (which make absolutely no sense at all) provide that the base of the support structure or antenna must be set back from the nearest lot line 110 percent (or more) of the overall height of the antenna system. This in many cases precludes amateurs from installing an antenna at any functional height whatsoever, due to the shape of a particular lot or the overall length or

width. While this setback restriction may appear aimed at insuring safety of an installation, it is clearly regulatory overkill.

Point 7. The Commission should specify that safety-related land use restrictions which have the effect of significantly limiting overall height of antennas, or which determine by lot size whether a functional amateur antenna can be installed at all, are invalid unless there is no less-burdensome alternative which would accomplish the same purpose.

A recent example of an unreasonable setback restriction in a case in Pennsylvania is that, within basic building setbacks, an antenna support structure must be set back an additional one foot for each foot of height. This type of restriction is completely unnecessary to insure safety of the proposed installation. The safety of an antenna installation is based on the foundation and the structural integrity of the antenna support, not its height or setback. Less burdensome alternatives, assuming that the municipal interest is in a worst-case fall radius within property lines, include the use of retractable antennas, guyed antennas (which, according to structural engineers, fall, if at all, within a radius not larger than 20 percent of overall height AGL) or house-bracketed antennas. A model ordinance circulated by the American Planning Association provides that a 20 percent setback is sufficient for radio and television antennas.[15]

[15] Structural engineers design guyed towers such that a fall radius is calculated at 20 percent of the height of the antenna. Such a presumption is found in the Multnomah County, Oregon antenna

Safety of an antenna installation is, after all, a function of the building code, not of the zoning ordinances. It is, by nature, not directly related to antenna height. The amateur radio licensee should not be deprived of the ability to install a safe, effective antenna by the arbitrary selection of setback restrictions not intended to address antennas in the first place, where the same local purpose could be served by a practical, less burdensome alternative. Such is consistent with the current "minimum practicable restriction" requirement of PRB-1, a provision often ignored by the courts in applying PRB-1 in individual cases.

IV. Clarification of PRB-1 is Timely

45. The Commission is now in the process of considering necessary changes to its preemption policies regarding satellite dish antennas in IB Docket No. 95-59. In that proceeding, the Commission was asked in comments filed by the National Association of Broadcasters, the Association of Maximum Service Television, and the League, to consider preemption of other facilities besides satellite dish antennas. The Commission noted[16] that the League had requested clarification of its amateur radio antenna preemption policies as well. Nonetheless, the Commission decided to limit that

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ordinance, which is used as a model by the American Planning Association in its publication on regulating radio and television antennas. See, Bookin, B. and Epstein, L., Regulating Radio and TV Towers, American Planning Association Planning Advisory Service Report No. 384, June, 1984.

[16] See, 10 FCC Rcd. at 7004.

proceeding to satellite dish antennas only. However, in doing so, it held as follows:

> The focus of this proceeding is satellite earth stations and is based on a record detailing problems with satellite antennas. Expansion to other types of facilities would be inappropriate. However, we note that this should not be construed as approval of unreasonable local regulation of non-satellite antenna facilities. The Commission is committed to assist in the expansion of telecommunications in general. Local regulation that needlessly inhibits such expansion is contrary to our goals and policies.
>
> 10 FCC Rcd. at 7005.

The League respectfully suggests that as the Commission resolves its satellite dish preemption policies, it should consider as a companion item, to be considered consecutively, the revision of its PRB-1 policies as proposed herein. The need to do so, in order to promote the Federal interest in amateur radio is compelling and urgent; many of the considerations applicable to residential satellite antennas are equally applicable to amateur radio antennas; and the inability of individual amateur licensees to expend the necessary resources themselves to protect their ability to provide public service communications to the public is similar to the inability of individual dish owners to individually address the instances of unreasonable state and local regulation of antennas.

46. Also, as noted hereinabove at footnote 2, clarification of the PRB-1 policies as proposed herein is consistent with the determination of Congress that "reasonable accommodation should be made for the effective operation of amateur radio from residences, private vehicles and public

areas, and that regulation at all levels of government should facilitate and encourage amateur radio operation as a public benefit." Pub. L. 103-408, a Joint Resolution to recognize the achievements of radio amateurs, and to establish support for such amateurs as national policy.

V. Conclusions

47. The League is, as discussed above, disinterested in any action that might defeat the progress made, at great expense, by individual amateurs to date in the application of PRB-1, as codified. However, the above points are, in the League's opinion, within the scope of the Commission's intent when it issued its preemption order in the first place. Clarification of the same would offer sufficient guidance to municipalities so that they can, in the course of their normal legislative processes, enact provisions that make fair accommodation for amateurs. What is sought to be avoided, to date unsuccessfully, is the expensive and highly divisive litigation between the Commission licensee (who is attempting to do no more than to provide public service communications), and the very municipality that the radio amateur seeks, by his or her communications, to serve.

48. Accordingly, the League urges that the Commission revise and restate its preemption policy, and that it issue a Notice of Proposed Rule Making without delay, looking toward amendment of Section 97.15(e) of the Amateur Service rules to

incorporate the clarifications set forth herein, as per the attached Appendix.

Therefore, the foregoing considered, the American Radio Relay League respectfully requests that the Commission initiate rule making proceedings as requested herein.

Respectfully submitted,

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